

SHORT RECORD  
18-3659  
FILED 12/18/18

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

UNIVERSITY OF CHICAGO,

Petitioner,

v.

NATIONAL LABOR RELATIONS  
BOARD,

Respondent.

Petition for Review

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PETITION FOR REVIEW OF DECISION AND ORDER  
OF THE NATIONAL LABOR RELATIONS BOARD

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(f), Petitioner, which transacts substantial business within this Circuit, petitions the United States Court of Appeals for the Seventh Circuit for review of, and respectfully requests that the Court set aside, the Decision and Order entered by Respondent, the National Labor Relations Board, in Case No. 13-CA-217957. A copy of the Decision and Order, which is reported at 367 NLRB No. 41, is attached as Exhibit A.

Dated: December 18, 2018

Respectfully submitted,

*s/ Jacob M. Rubinstein*

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***EXHIBIT A***

*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**University of Chicago and Healthcare, Professional, Technical, Office, Warehouse and Mail Order Employees, Local 743, IBT.** Case 13-CA-217957

December 4, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and amended charge filed on April 6, 2018, and June 14, 2018, respectively, by Healthcare, Professional, Technical, Office, Warehouse and Mail Order Employees, Local 743, IBT (the Union), the General Counsel issued the complaint on June 15, 2018, alleging that University of Chicago (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 13-RC-198365. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint.

On July 10, 2018, the General Counsel filed a Motion for Summary Judgment. On July 11, 2018, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification of representative on the basis of its contention, raised and rejected in the underlying representation proceeding, that the unit is not appropriate because it consists of students who are not employees within the meaning of Section 2(3) of the Act and who, even if they are employees, are temporary and/or casual employees specifically excluded from the unit and/or are not entitled to collectively bargain under the Act.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to ad-

duce at a hearing any newly discovered and previously unavailable evidence, nor has it shown any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).<sup>1</sup>

Accordingly, we grant the Motion for Summary Judgment.<sup>2</sup>

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Chicago, Illinois (the Respondent's facility), and has been operating a private nonprofit teaching and research university.<sup>3</sup>

<sup>1</sup> In its response to the Notice to Show Cause, the Respondent acknowledges that generally, in the absence of special circumstances, a respondent is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. The Respondent argues, however, that the Board is not precluded from reconsidering such previously litigated issues in order to correct erroneous conclusions from prior proceedings, citing *St. Francis Hospital*, 271 NLRB 948, 949 (1984) (Board reconsidered and vacated its earlier decision in the underlying representation proceeding and formulated a revised approach to health care employee units), and *Sub-Zero Freezer Co.*, 271 NLRB 47, 47 (1984) (Board reconsidered and reversed its earlier decision in the underlying representation proceeding). *St. Francis Hospital* and *Sub-Zero Freezer* are two of a limited number of cases in which the Board has departed from the rule that, in a certification testing unfair labor practice case, issues that had been presented to and decided by the Board in a prior, related representation case cannot be relitigated and will not be reconsidered. Having reviewed the facts and arguments presented by the Respondent in its response to the Notice to Show Cause, we find no basis for departing from our longstanding rule or disturbing our Decision on Review and Order affirming the Regional Director's decision in the underlying representation case. See *Memorial Hospital of Salem County*, 357 NLRB No. 119, slip op. at 1-2 fn. 5 (2011) (not reported in Board volume), enf'd. sub nom. *Salem Hospital Corporation v. NLRB*, 808 F.3d 59 (D.C. Cir. 2015); cf. *Local 340, New York New Jersey Regional Joint Board*, 365 NLRB No. 61 (2017).

<sup>2</sup> Chairman Ring did not participate in the underlying representation proceeding. He agrees with his colleagues that the Respondent has not raised any litigable issue in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal. In a future appropriate proceeding, however, Chairman Ring would agree to consider whether, and under what circumstances, students qualify as "employees" within the meaning of Sec. 2(3) of the Act. Members Kaplan and Emanuel note that they participated in prior stages of the underlying representation proceeding in which relitigation of the employee status issue was precluded. Like the Chairman, they have expressed an interest in considering, in a future appropriate proceeding, whether and under what circumstances students qualify as "employees" under the Act.

<sup>3</sup> In its answer, the Respondent admits only that it is a "private research and teaching university organized as a not-for-profit corporation

In conducting its operations during the calendar year ending December 31, 2017, the Respondent derived gross revenues available for operating expenses in excess of \$1 million, and purchased and received at its Chicago, Illinois facility products, goods, and materials valued in excess of \$5000 directly from points outside the State of Illinois.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. The Certification

At all material times, Barb Lindner held the position of Senior Employee / Labor Relations Consultant and has been an agent of the Respondent within the meaning of Section 2(13) of the Act.

Following the representation election held on June 2 and June 5–8, 2017, the Union was certified<sup>4</sup> on March 19, 2018, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All hourly paid student employees of the University of Chicago Libraries, including students employed at the Joseph Regenstein Library, the Joe and Rika Mansueto Library, Eckhart Library, John Crerar Library, D'Angelo Law Library, and the Social Services Administration Library.

Excluded: All employees represented by other labor organizations and covered by other collective-bargaining agreements, temporary employees, managerial employees, guards, and professional employees and

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with its main campus in Chicago Illinois," stating that it denies the remaining allegations of this paragraph. However, in the underlying representation proceeding, the Respondent stipulated, and the Regional Director found, that the Respondent, "an Illinois private nonprofit corporation, is a teaching and research university located in the City of Chicago, Illinois." To the extent that these admissions differ from the complaint allegations, we find that the Respondent's denials do not raise any issues of fact warranting a hearing.

<sup>4</sup> The Regional Director issued a Supplemental Decision and Certification of Representative on July 10, 2017. Subsequently, the Respondent filed a request for review of the Regional Director's Supplemental Decision and Certification of Representative. On December 15, 2017, the Board granted the Respondent's request for review with respect to one of the Respondent's objections and remanded the case to the Regional Director for consideration. On March 19, 2018, the Regional Director issued a Supplemental Decision on Remand from the Board and Certification of Representative wherein he denied the Respondent's exceptions to the Hearing Officer's Report on Objections. By unpublished order dated May 21, 2018, the Board denied the Respondent's request for review.

supervisors as defined in the National Labor Relations Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

### B. Refusal to Bargain

By letter dated March 27, 2018, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees. Since about March 27, 2018, the Respondent has failed and refused to do so.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By failing and refusing, since about March 27, 2018, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to recognize and bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

## ORDER

The National Labor Relations Board orders that the Respondent, University of Chicago, Chicago, Illinois, its officers, agents, successors, and assigns, shall

### 1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Healthcare, Professional, Technical, Office, Warehouse and Mail Order Employees, Local 743, IBT (the Union), as the exclusive collective-bargaining representative of the employees in the bargaining unit.

## UNIVERSITY OF CHICAGO

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(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Included: All hourly paid student employees of the University of Chicago Libraries, including students employed at the Joseph Regenstein Library, the Joe and Rika Mansueto Library, Eckhart Library, John Crerar Library, D'Angelo Law Library, and the Social Services Administration Library.

Excluded: All employees represented by other labor organizations and covered by other collective-bargaining agreements, temporary employees, managerial employees, guards, and professional employees and supervisors as defined in the National Labor Relations Act.

(b) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 27, 2018.

<sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 4, 2018

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Healthcare, Professional, Technical, Office, Warehouse and Mail Order Employees, Local 743, IBT (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Included: All hourly paid student employees of the University of Chicago Libraries, including students employed at the Joseph Regenstein Library, the Joe and Rika Mansueto Library, Eckhart Library, John Crerar Library, D'Angelo Law Library, and the Social Services Administration Library.

Excluded: All employees represented by other labor organizations and covered by other collective-bargaining agreements, temporary employees, managerial employees, guards, and professional employees and supervisors as defined in the National Labor Relations Act.

UNIVERSITY OF CHICAGO

The Board's decision can be found at [www.nlr.gov/case/13-CA-217957](http://www.nlr.gov/case/13-CA-217957) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



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**CERTIFICATE OF SERVICE**

I, Jacob M. Rubinstein, state under oath that I caused a copy of the PETITION FOR REVIEW OF DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD to be submitted on December 18, 2018 to the Clerk of the Court, United States Court of Appeals for the Seventh Circuit. Copies of this submission have been served on the following individuals by e-mail:

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*s/ Jacob M. Rubinstein*

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